I.

THE ACTION IS NOT BARRED BY LACHES.

1.

THE COURT HAS POWER TO ANNUL A MOTOR CARRIER' CERTIFICATE.

Appellee Glendenning Motorways, Inc., argues that when the Commission issued the certificate of public convenience and necessity to Styer on July 11, 1942, (R. 19) Styer's rights became fixed to the extent that thereafter no action could be brought in court to annul the Commission's order or certificate. It is perfectly clear that this contention has no merit.

It is well settled that action lies to annul a certificate to construct a railroad issued under the provisions of paragraphs (18), (19), and (20) of Section 1 of the Interstate Commerce Act, 49 U. S. C. A. 1, (18), (19), (20). In *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, the Court said, referring to these provisions (p. 392):

> "The inhibition applies where there is no certificate in fact, or where the Commission lacked power to grant the outstanding one because of insufficient evidence or other reason. *An invalid certificate would leave the situation as though none had issued.*" (Emphasis supplied.)

In *Alton Railroad Co.* v. *United States,* 315 U. S. 15, the Court said in holding the railroads parties in interest entitled to maintain the action (p. 19):

> "They rest their right to sue on Sec. 205 (h) of the Motor Carrier Act (49 USCA Sec. 305 (h)) which provides that 'Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I. * * *'

In that case there was a dispute as to the facts. The road attempting to build the line claimed that the protesting line had stood by while they were making preparations, while the protesting line claimed it acted as soon as it received knowledge.

We call attention to the fact that in *Chicago Junction case, supra,* the Court characterized the ten months between final action of the Commission and the bringing of the suit as a "brief lapse of time"; and declined to sustain the defense of laches even though, based on the delay, New York Central had consummated a stock purchase of $750,000 and entered into a lease calling for the payment of two million dollars per year.

Under the facts, we submit that the only two expressions of this Court on this question make it evident that there was no laches on the part of the appellants in the instant case.

In the Federal cases cited by appellees Styer and Glendenning the lapse of time relied upon varied from five years in *Galliher* v. *Cadwell,* 145 U. S. 368, and *Penn Mutual Life Insurance Co.* v. *Austin,* 168 U. S. 685, to nine years in *Alsop* v. *Riker,* 155 U. S. 448. In all of the cases cited by appellees the familiar point is heavily stressed that delay alone does not constitute laches but that there must be unreasonable delay coupled with a change of position caused by the delay; and it was the fact that the party charged with laches stood idly by with notice and knowledge that the other party was changing his position in reliance on conduct indicating acquiescence in the adverse claim and abandonment of the right to contest it.

Here both Styer and Glendenning were bound to know that the appellants, protestants through the proceedings before the Commission, were given the unquestioned right to sue to set aside the Commission's order. Appellants

> Section 1 (20) of Part I (49 USCA Sec. 1 (20)) authorizes 'any party in interest' to sue to enjoin any construction, operation or abandonment of a railroad made contrary to Sec. 1 (18) or (19). Such suits may be maintained not only where the railroad proceeds without authorization of the Commission but also where it proceeds under a certificate of the Commission whose validity is challenged. *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382. Hence we conclude that Sec. 205 (h) has incorporated by reference the 'party in interest' provision of Sec. 1 (20)."

Appellee apparently tries to differentiate between the sections of the Act in Part I dealing with railroad certificates and the sections in Part II that relate to motor carrier certificates, but appellee's argument is not sound. Appellee claims that Section 212 of Part II, 49 U. S. C. A. 312, because it contains specific provisions for the revocation of certificates, provides the exclusive remedy in that regard and removes certificates from the reach of the provisions of the Act authorizing suits to set aside orders of the Commission. There are several difficulties with appellee's theory. In the first place, a comparison of the aforesaid provisions of Parts I and II of the Act does not support appellee. Paragraphs (18), (19), and (20), of Section 1 provide that no railroad can be constructed, extended, operated, or *abandoned*, except under the authority of a certificate issued by the Commission. In those respects these provisions are identical with the provisions relating to motor carrier certificates in Section 212. However, the Court holds, as pointed out above, that action may be had to set aside a certificate.

The obvious point, of course, is that the provisions in Parts I and II relating to Commission procedure with respect to certificates, were not intended to deprive the courts of the power to review Commission action under Parts I and II, as described in *Claiborne-Annapolis Ferry Co.* v.

did nothing to mislead them respecting review of the Commission's order and they made no effort to ascertain appellants' intentions in that regard. Appellants had no notice of the negotiations or sale until after the filing of the application for approval. The fact that the suit was brought on October 30, 1942, has in no way affected Styer's rights or benefits he hopes to gain from his contracts with Glendenning. If appellants prevail in this suit Styer is no worse off with respect to the Glendenning contract than if the suit had been started on April 7, 1942. As far as Glendenning is concerned, if plaintiffs prevail he has the right to rescission of his contract with Styer. And after Styer and Glendenning both learned, on October 31, 1942, of the commencement of this suit, they both went ahead to effectuate their plans for sale as if nothing had happened. The sale was the important thing to both of them, absolutely necessary to Styer and important enough to Glendenning that he spent $8,918 to repair Styer's equipment after he learned of the suit. It is apparent that they would have done just the same regardless of the time when this suit was filed.

II.

REPLY ON THE MERITS.

We do not here attempt to reargue the points stated in our first brief. We only call attention here to certain of appellees' erroneous claims as to what the evidence shows.

THE STIPULATION AND AMENDMENT.

The Styer and Government briefs devote much space to arguing that stipulations fairly and honestly entered into between the parties most concerned can be totally disregarded. To us this seems amazingly strange doctrine.

United States, supra, and *Alton Railroad Co.* v. *United States, supra.* In both parts of the Act review of Commission action by the courts is provided by the same legislative enactments that define the Commission's power.

There is an evident practical reason why the Commission's action can still be reviewed in court after a certificate has issued. No period of time is specified either by statute or rule within which a certificate is to be issued after a Commission order has been filed. According to appellee's theory, if on the same day the Commission filed an order it also issued a certificate, or if it waited to issue a certificate until the same day it denied a petition for reconsideration, it could effectively block any court test of its orders involving certificate matters.

We have replied to appellee's argument in its own terms without stating perhaps the plainest defect in it. After all, a certificate is no more than evidence of the terms of an order, and rises no higher. The essential thing is the determination of the Commission of the matter before it, that is, the order; and there can be no doubt as to the power of the courts to review it.

2.

THE ESSENTIAL ELEMENTS OF LACHES ARE LACKING.

The complete answer to appellees' contentions as to laches is that the necessary elements of such defense are lacking.

Delay alone is not sufficient to make available the defense of laches; in addition to unreasonable delay the conduct of the appellants must have been such as to warrant the conclusion that they acquiesced in the erroneous decision of the Commission and intended to abandon their right to seek review of the same, *and in addition it must appear that in reliance on such conduct appellees substantially and*

Its enormous inconvenience as a practical matter should be evident to every practitioner before the Commission, as well as the Commission itself, as pointed out in the last paragraph of page 13 of our first brief.

The excuse given for flouting the given word of counsel and party is that "there was public need for the service." It is contended that the Commission is empowered by the act to authorize service to the intermediate points on both the "grandfather" and public convenience and necessity routes because "there was a public need for the service." This contention is particularly emphasized in the outline of "questions presented" on pages 2 and 3 of the Government brief.

Assuming for purpose of argument that the Commission might have such power if "there was a public need for the service," the basic factual fallacy in that argument is that the record is utterly silent as to any "public need for the service." There is not a shred of evidence to sustain such a finding. Appellees have not attempted to point to such evidence, for the reason of course that it does not exist.

LEGISLATIVE HISTORY OF SECTION 208.

On pages 26 and 27 of the Government brief, legislative history is cited in an attempt to sustain the Government's theory that irrespective of the desires of an applicant for "grandfather" authority, the Commission can compel such applicant to serve territory not applied for by him when there is public need for such service.

It is submitted that the legislative history recited proves just the contrary of the Government's theory and supports the argument on pages 21 to 23 of our first brief. The Government sets out a quotation from the report of the Federal Coordinator of Transportation, S. Doc. 152, 73rd.

prejudicially changed their position. Townsend v. *Vanderwerker,* 160 U. S. 171, 186; *Merrill National Bank* v. *Jacksonville,* 173 U. S. 131, 135; *Northern Pacific Railway Co.* v. *Boyd,* 228 U. S. 482, 510; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488, 489.

The earliest that appellants could have started this suit was April 6, 1942, the date of the denial of the petition for reconsideration. Between that date and the time Styer and Glendenning entered into the lease and sale contract, September 22, 1942, approximately five and one-half months elapsed. The negotiations for the lease and sale were started immediately after the issuance of the certificate of public convenience and necessity, July 11, 1942. The suit was started October 31, 1942. Clearly, waiting this short period of time before starting suit cannot be considered an unreasonable delay, nor were appellees justified in concluding therefrom that appellants acquiesced in the order and intended to abandon their right to seek review of it. Appellants did nothing to mislead appellees or to indicate such acquiescence or abandonment. Inquiry of appellants, who were protestants before the Commission and three of whom had their main offices in the Twin Cities, would have disclosed to appellees that appellants did not intend to acquiesce in the order nor to abandon their right of review. Appellees elected not to make such inquiry but rather to rely solely on the short lapse of time as indicative of acquiescence and abandonment. Standing alone the failure to make this inquiry is sufficient to deprive appellees of the right to claim laches.

But the essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488, 489. *"Laches is usually not mere delay, but standing by watching one change his position or delay for such length of time that it*

Cong., 2d. sess., p. 47, one sentence of which we here repeat:

> "There is added to Section 6 of the Rayburn Bill a provision which authorizes the Commission to *require* service to intermediate and off-route points." (Emphasis supplied.)

For the Court's convenience we set out below Section 6 of the Rayburn Bill, H. R. 6836, 73rd Cong., 2d. sess.[1] A comparison of Section 6 of the Rayburn Bill with Section 208 of Part II of the Interstate Commerce Act, 49 U. S. C. A. 308, discloses that the language calculated to "require service" in Section 6 of the Rayburn Bill was not included in the Act as finally passed. The reason for elimination of the words *"the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory, and"* was stated by Senator Wheeler on the floor of the Senate. 79 Cong. Rec. 5654. He said that this clause was objected to because it would require the authorization from the Commission for every increase in the facilities of a motor carrier, and that to take care of such objections the proviso at the end of subparagraph (a) of Section 208 had been added.

It will thus be seen that whatever intention there may have been to incorporate in legislation regulating motor carriers a provision to *require* motor carriers to render service, in the sense contended for by the Government, such provision was not included in the Act as passed.

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1. Sec. 6. (a) Any certificate of public convenience and necessity issued under section 5 shall specify the routes over which, the fixed termini, if any, between which, and, in case of operations not over specified routes or between fixed termini, the territory within which, and the service which the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms and conditions as the public convenience and necessity may from time to time require, including terms and conditions as to the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory, and the extension of the line or lines of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the commission under section 2 (a) (1) and (3).

The fallacy of the Government's theory is further illustrated by the enactment of Section 101 of the Second War Powers Act, 1942 (Act of March 27, 1942, ch. 199, title I, sec. 101, 56 Stat. 176). Section 101 amended Section 204 of the Interstate Commerce Act, 49 U. S. C. A. 304, by adding after subsection (d) thereof a new subsection (e) giving to the Commission the same power with respect to motor carriers as it has with respect to other carriers under Section 1 (15) of Part I of the Interstate Commerce Act. Section 1 (15) grants authority to the Commission to compel railroads to render service, and it was considered by the Commission and by Congress that no such authority with respect to motor carriers existed, and that therefore special legislation of that character was necessary. Section 101 also added to Section 204 a new subparagraph (f) giving the Commission emergency authority over motor carrier certificates, which had not theretofore existed.

THERE WAS NO HOLDING OUT TO SERVE INTERMEDIATE MINNESOTA POINTS.

In pages 10 to 16 of Styer's brief he attempts to show (1) that during the "grandfather" period he was serving or holding out to serve the intermediate Minnesota points, and (2) that when he referred in his testimony to the "intermediate points" he was referring to intermediate points in Minnesota as well as in South Dakota.

It appears from Styer's own evidence (R. 127-129, 132) that during the "grandfather" period Styer did not pick up or deliver any freight at any of the intermediate Minnesota points. Styer, however, attempts to bolster this lack of actual service by a claim of "holding out" and "solicitation" with respect to the intermediate points. To that end, in pages 11 to 16 of his brief, Styer quotes various scattered sentences from the record in an attempt to show

that when he said "intermediate points" he meant Minnesota as well as South Dakota intermediate points.

We submit that it is perfectly clear from the record that when Styer said he was holding out service to the "intermediate points" he was referring only to South Dakota points. Instead of following appellee's example of taking isolated excerpts from the record to establish our contention, we believe it will save time and space if we set out, for the Court's convenience, the complete record on this point. We called attention, in our first brief, pages 14-18, to the District Court's and the Commission's findings with respect to this. And on page 18 we referred the Court to several complete pages of the record consisting of Styer's testimony. We now set out this testimony in full (R. 92-94):

> "On and prior to June 1, 1935, I solicited business for intermediate points on the regular routes I operated over. I contacted personally quite a few shippers. They were located principally in the Twin Cities because that was the location of our main office, and also because the time being limited between the time I started and June 1, that I have not had an opportunity to go out into the field a great deal myself. I instructed National Truck Terminal, with whom we were associated at the beginning of my business, to have their solicitors solicit business for a list of towns and to have their drivers accept shipments to those towns for Northern Transportation Co. This concern was and still is independent and handles pickup, delivery and soliciting for various truck firms. Also they have dock space available for use of carriers. We had an office in the National Truck Terminal building (p. 42-45). We used the dock and those terminal facilities at the commencement of our operations on June 1, 1935. This concern had solicitors and also men from their office and also their pickup drivers who solicited for the carriers using that service. Exhibit 5[2] is a copy of a list

2. R. 134. This is a schedule of transportation rates between the Twin Cities and South Dakota points only.

of towns and rates used by J. W. Crabb for service into South Dakota prior to my starting as a proprietor in the trucking business. This is the same Crabb I had worked for previously and he did business as North West Transportation Co. He had his terminal facilities in the Twin Cities at the National Truck Terminal, and Exhibit 5 was prepared in its present form by that company. On April 1, 1935, Crabb was not in business. The list of towns which I instructed the National Truck Terminal to solicit business on my account is on Exhibit 5. Also I asked them to quote the rates there shown to the points indicated (pp. 46, 47, 48).

"It was my purpose from the beginning to solicit and render service to the intermediate points. What I attempted to do was to get a truck service comparable to that that Crabb had been giving. It was a daily service to a number of points in South Dakota; to any of the points along the routes. We accepted any freight we were able to get from the time we started. We solicited freight for all points along the route. Because of various contacts at some of these towns we got much more freight there. I (fol. 125) was born at Huron and was well acquainted there and consequently Huron developed faster than some of the other points, but at no time did we turn down freight for any of these points along the routes in South Dakota. I am referring to the towns shown by Exhibit 5 (pp. 53, 54). Between April 1 and June 1, 1935, my facilities were such as to permit carrying shipments to the intermediate points not covered by Exhibit 3. There was actual space on my trucks which would have allowed me to accept, carry and deliver shipments to these intermediate points had I received any during the period prior to June 1, 1935 (p. 54). Never at any time did I intend or offer to the public simply a non-stop operation between the Twin Cities and Huron prior to June 1, 1935 (pp. 54, 55).

"I have personal recollection of having solicited particular shippers prior to June 1 for shipments from the Twin Cities to South Dakota points located on or near the routes described in this case."

STYER'S EASTBOUND OPERATION WAS OVER IRREGULAR ROUTES.

On page 23 of his brief Styer argues that his eastbound operation during the "grandfather" period consisted of both an irregular route operation to scattered points in Minnesota and also a regular route operation. Styer's own testimony is that during the "grandfather" period, he was transporting commodities from South Dakota points over irregular routes to 26 or 27 widely scattered Minnesota points, none of which, except Minneapolis and St. Paul, were on the "regular routes." (R. 105.) During this period he owned two straight trucks, and two tractors and two semitrailers; that is, four units of motor vehicle equipment. (R. 90.) It is perfectly obvious that during the "grandfather" period he could not have served all of these points, scattered as they are over several hundred miles from the southern to the northern part of Minnesota, and still have operated regularly over any regular route. That is why the Commission and the District Court found that during the "grandfather" period Styer's eastbound operation was an irregular route operation (R. 12, 60) and the Commission found that subsequent to the "grandfather" period his irregular route operation had "evolved" into that of a regulate route operation. (R. 12.)

Respectfully submitted,

WARREN NEWCOME,
AMOS MATHEWS,
Attorneys for Appellants.